United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4203

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4203

JULIA D. VICTORINO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys,
Of Counsel.

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BRIEF FOR RESPONDENT

Issue Presented

WHETHER THE DECISION OF THE BOARD OF IMMIGRATION APPEALS, AFFIRMING THE IMMIGRATION JUDGE'S DENIAL OF PETITIONER'S APPLICATION FOR WITHHOLDING OF DEPORTATION, WAS ARBITRARY AND CAPRICIOUS OR AN ABUSE OF DISCRETION

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act, 8 U.S.C. § 1105a, Julia D. Victorino petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on July 17, 1975. That order dismissed an appeal from a decision of an Immigration Judge denying Victorino's application for withholding of deportation pursuant to

Section 243(h) of the Act, 8 U.S.C. § 1253(h). Petitioner contends that the Board's order should be reversed because the denial of her application for withholding of deportation violated her Fifth Amendment right to due process of law.

Statement of Facts

The petitioner is a 30 year old alien, a native and citizen of the Philippines, who was admitted to the United States on May 1, 1970 as a nonimmigrant visitor for pleasure and was authorized to remain until December 15, 1970. She failed to depart at the expiration of her authorized stay and has continued to reside and work in the United States in violation of the law.

On November 13, 1973 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings against the petitioner with the issuance of an order to show cause and notice of hearing charging that she was deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2) (T. 14). On November 21, 1973 the petitioner made an administrative application for political asylum in the United States (T. 13). On December 27, 1973 the alien was interviewed at the Service's district office at New York with respect to this application (T. 12). In accordance with established procedures, 8 C.F.R. § 108, the Service's District Director requested an advisory opinion from the Department of State, Office of Refugee and Migration Affairs (T. 12). On March 29, 1974 the Department of State responded finding that there was no reason to believe that the petitioner should be exempt from regular immigration procedures on the grounds that she would suffer persecution on account of race, religion, nationality, political opinion or membership in a particular social group (T. 11). The Service did not grant the petitioner's request for asylum, and proceeded forward with the deportation proceedings.

At her deportation hearing on January 23, 1975 the petitioner, by her counsel, conceded her deportability as charged in the Order to Show Cause (T. 9, p. 1). During that proceeding the alien again applied for withholding of deportation pursuant to Section 243(h) of the Act on the ground that she would suffer persecution on account of her political opinion. In response to this application the Service's attorney introduced into evidence the Department of State's advisory opinion which had been previously obtained by the Service, as well as, the District Director's request for that recommendation (T. 11, 12, 9, p. 6). During the hearing the petitioner was also questioned by her attorney in order to elicit testimony which might support her claim of anticipated persecution. The alien was also granted leave to submit documentary evidence relating to her application (T. 9, 8).

On February 25, 1975 the Immigration Judge rendered a decision denying the alien's application for withholding of deportation pursuant to Section 243(h) of the Act, finding that she had failed to sustain her burden of establishing that she would be subject to persecution within the meaning of Section 243(h) of the Act (T. 7). The Immigration Judge granted her the privilege of voluntary departure in lieu of enforced deportation pursuant to Section 244(e) of the Act, 8 U.S.C § 1254(e). On March 5, 1975 the petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T. 5). On July 17, 1975 the Board dismissed the appeal (T. 2). Since the filing of this petition the alien has enjoyed the automatic statutory stay of deportation which accompanies the filing of a petition pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. § 1253—

* * * * *

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

Relevant Regulation

Title 8, Code of Federal Regulations (C.F.R.) § 242.17

242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation. * * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

POINT I

The Attorney General did not abuse his discretionary authority in denying petitioner's application for temporary withholding of deportation.

A. General Background

Section 243(h) of the Act, 8 U.S.C. § 1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* *Muscardin* v. *Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. § 242.17(c); *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390

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* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

U.S. 1003 (1968). See also *Hyppolite* v. *Immigration and Naturalization Service*, 382 F.2d 98 (7th Cir. 1967); *Lena* v. *Immigration and Naturalization Service*, 379 F.2d 536 (7th Cir. 1967).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. *Muscardin* v. *Immigration and Naturalization Service, supra; Zupicich* v. *Esperdy*, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Vardjan* v. *Esperdy*, 197 F. Supp. 931 (S.D. N.Y. 1961), *aff'd.*, 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the alien's application for withholding of deportation. *Li Cheung* v. *Esperdy*, 377 F.2d 819 (2d Cir. 1967); *Kladis* v. *Immigration and Naturalization Service*, 343 F.2d 515 (7th Cir. 1965).

B. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as

an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule; that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. *Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that she would be subject to persecution. *MacCaud* v. *Immigration and Naturalization Service*, 500 F.2d 355 (2d Cir. 1974). She must set forth the condition relating to her personally which support her anticipation of persecution. *Fu* v. *Immigration and Naturalization Service, supra*. This the petitioner is unable to do.

The basis of the alien's claim is that martial law had been instituted by the Government of the Philippines after she was admitted to the United States in 1970, and during her prolonged and illegal stay in this country. As pointed out in the decision of the Immigration Judge her fear of returning to the Philippines is principally an economic one, which is of general applicability to all citizens of that country, and not a fear of persecution which occurs by reason of her race, religion, nationality, political opinion or membership in a particular social group. Her evidence, consisting solely of bare conclusory statements relating to the then existing political situation in her homeland, were without first hand knowledge or factual support which might demonstrate the reasonableness of her fear that *she* would be persecuted. It is respectfully submitted that this is insufficient to sustain her burden. See *Khalil* v. *District Director*, 457 F.2d 1276 (9th Cir. 1972); *Gena* v. *Immigration and Naturalization Service*, 424 F.2d 227 (5th Cir. 1970).

Victorino claims that she will be subject to political persecution because of a political climate applicable to all citizens of the Philippines. This allegation is insufficient

to satisfy the requirement of personal and particularized persecution under Section 243(h) of the Act. Questioning by her attorney and the Immigration Judge failed to elicit any response as to how she herself would suffer harm from her own political opinions. Rather, the testimony given at the deportation hearing indicates that neither she nor her family has ever been the subjects of political persecution. In this respect she testified that neither she or her parents and siblings have ever been arrested or harmed as a result of her political beliefs. She further testified that she had only heard of a changed political climate in the Philippines after she entered the United States. She vaguely described what she believed to be the consequences of martial law with respect to freedom of speech on the general public, but failed to produce any evidence as to how she might be the subject of political persecution upon returning to her native country. Further, her testimony reflected economic rather than political considerations. For example, she testified that she had been unemployed for approximately a year and a half prior to entering the United States and that as a result of the political climate she had heard that economic conditions had become less tolerable during her visit in the United States (T. 9, pp. 9, 17). Although the petitioner may in fact be opposed to the present government in the Philippines (but even this has not been established in the record of proceedings), and may quite understandably prefer life in the United States, the statute demands a determination based upon the probability of persecution of the petitioner herself, not of others or the general public. *Kovac* v. *Immigration and Naturalization Service*, 407 F.2d 102 (9th Cir. 1969).

It is submitted that the petitioner has not met the burden of proving that she would be singled out as an individual and persecuted upon her return to the Philippines and accordingly there was no abuse of discretion in denying her withholding of deportation on these grounds.

POINT II

The Immigration Judge did not err in admitting into evidence the advisory opinion obtained from the Department of State.

The petitioner contends that the Department of State's "denial" of her request for political asylum violates her Fifth Amendment right to due process of law in deportation proceedings. It is submitted that such a contention erroneously describes the procedures involved in deportation hearings relating to an application under Section 243(h) of the Act, and is totally extraneous to the issue in this case. This petitioner first made an application for political asylum with the District Director for the Service (T. 13). Under established procedures, if the District Director does not approve the claim, he forwards it to the Office of Refugee and Migration Affairs, Department of State, for an expression of its views. Rather than being an administrative "denial" of her application for political asylum the letter from the Department of State is merely advisory in nature and is not binding upon the Service. After studying the case, the Director of the Office of Refugee and Migration Affairs was of the opinion that petitioner did not have a valid persecution claim and the District Director, apparently concurring, denied the application. The refusal of the District Director to grant an application for asylum does not deprive the alien of again applying for withholding of deportation pursuant to Section 243(h) of the Act at a deportation hearing.

Subsequently, petitioner applied for withholding of deportation and her persecution claim was considered *de novo* by the Immigration Judge. The Immigration Judge did not request an expression from the Department of State concerning the likelihood of persecution. Rather, the Service's trial attorney offered into evidence the

letter from the Office of Refugee and Migration Affairs obtained earlier by the District Director (T. 9, p. 6). The letter was merely one piece of evidence considered by the Immigration Judge and was in no way binding on him.* Victorino complains that the process by which the Department of State makes its recommendation *to the District Director* denies her the opportunity to inquiry into relevant facts considered by that department in formulating its opinion; to examine witnesses and information from that department; and to challenge its procedure. In this respect it is submitted that the petitioner is clearly in the wrong forum. Furthermore, the information contained in the District Director's request to the Department of State (T. 12) was received from the petitioner as a result of an interview on her application wherein she could have submitted any and all information which might have been favorable to her application.

With respect to the introduction of that advisory opinion at the deportation hearing wherein her claim was considered *de novo*, it is submitted that the letter "came from a knowledgeable and competent source and was

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* The petitioner's assertion that the letter from the Office of Refugee and Migration Affairs creates a double presumption against the alien, is ill founded and analogous to charges in the past where aliens have attacked decisions of the Immigration Judge and the Board of Immigration Appeals on the grounds that they were subject to the control of the Department of Justice and were therefore incapable of rendering impartial decisions. These contentions have been rejected by the Courts. *Marcello* v. *Bonds*, 349 U.S. 302 (1955); *Shaughnessy* v. *Accardi*, 349 U.S. 280 (1955); *Hosseinmardi* v. *Immigration and Naturalization Service*, 405 F.2d 25 (9th Cir. 1968). The Immigration Judge, although employed by the Department of Justice, is an independent hearing officer and his actions can be dictated by no one. If he is not even subject to the control of the department by which he is employed, it is difficult to see how he can be controlled by the Department of State, with which he has no relationship at all.

admissible at the hearing". *Asghari* v. *Immigration and Naturalization Service*, 396 F.2d 391 (9th Cir. 1969). See also 8 C.F.R. § 242.14(c). Such letters have been held admissible. *Hosseinmardi* v. *Immigration and Naturalization Service*, 40F F 2d 25 (9th Cir. 1969); *Sheng* v. *Immigration and Naturalization Service*, 400 F.2d 678 (9th Cir. 1968), *cert. denied*, 393 U.S. 1054 (1969); c.f. *Namkung* v. *Boyd*, 226 F.2d 385 (9th Cir. 1955), even though their quality may have been questioned.* *Hosseinmardi, supra*. The letter was certainly of probative value and the fact that the Immigration Judge gave it any consideration may well have been the result of the petitioner's failing to provide him with any rebuttal evidence either prior to, during, or after the deportation hearing although she was given the opportunity to do so.

The Immigration Judge made his decision based on the totality of the evidence, including both the petitioner's testimony and the letter. He enjoyed the advantage of seeing and hearing the petitioner, and was in the best position to determine the accuracy, reliability and truthfulness of the petitioner's testimony; and his evaluation thereof is entitled to great weight.

The deportation hearing complied with all the requirements of a fair hearing. *Sung* v. *McGrath*, 339 U.S. 33 (1950). The petitioner was represented by counsel. She was given the opportunity to be heard and to introduce evidence and witnesses on her behalf. 8 C.F.R. § 242.16. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be allowed to stand.

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* It is also noted that the admission of the opinion from the Department of State was not objected to by the petitioner during the deportation hearing. Furthermore the alien was given an opportunity to inspect that recommendation and to present evidence contradicting it. Compare *Radic* v. *Fullilove*, 198 F. Supp. 162 (N.D. Calif. 1961).

If the petitioner's persecution claim was rejected twice, once by the District Director and once by the Immigration Judge, it was not because of Government prejudice but rather because the claim is frivolous.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 75-4203

Pauline P. Troia being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 12th day of February, 19 76 she served 2 copys of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Barst & Mukamal, Esqs.,
127 John St.
New York, NY 10038

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
12th day of February, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977